Supreme Court, U.S.
FILED
AUG 1 1996
OFFICE OF THE CLERK

(5)

No. 95-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MARYLAND,
Petitioner,

v.

JERRY LEE WILSON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a police officer makes a lawful traffic stop, does the officer's automatic right to order the driver to exit the vehicle pursuant to *Pennsylvania v. Mimms* extend to passengers in the vehicle?

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland affirming the judgment of the suppression court is reported, *State v. Wilson*, 106 Md. App. 24, 664 A.2d 1 (1995), and is reproduced in the petition for writ of certiorari. (App. to Pet. for Cert. 1a). A prior unreported order to that same effect is reproduced in the petition for writ of certiorari. (App. to Pet. for Cert. 38a).

The unreported opinion and order of the Circuit Court for Baltimore County, Maryland, granting respondent Jerry Lee Wilson's motion to suppress is reproduced in the petition for writ of certiorari. (App. to Pet. for Cert. 33a).

The order of the Court of Appeals of Maryland denying the State's petition for a writ of certiorari is reported, *State v. Wilson*, 340 Md. 502, 667 A.2d 342 (1995), and is reproduced in the petition for writ of certiorari. (App. to Pet. for Cert. 37a).

STATEMENT OF JURISDICTION

The opinion of the Court of Special Appeals of Maryland affirming the granting of respondent Wilson's motion to suppress was filed on August 30, 1995. The Court of Appeals of Maryland denied the State's petition for writ of certiorari on November 22, 1995. The petition for a writ of certiorari was filed in this Court on February 9, 1996, and was granted on June 17, 1996.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

At approximately 7:30 p.m. on June 8, 1994, Maryland State Police Trooper David Hughes noticed a white 1994 Nissan Maxima driving at what appeared to be a high rate of speed on Interstate 95 in Baltimore County. (J.A. 7-8). Hughes pulled out onto the road and drove directly behind the vehicle, "pacing" it for one mile and determining its speed to be 64 miles per hour in a 55 miles-per-hour zone. (J.A. 9). Trooper Hughes saw that there were no license plates on the car, except that on the back there "was a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car." (J.A. 8). The officer activated his cruiser's lights and siren, but the driver continued for approximately one and one-half miles before finally stopping. (J.A. 10).

During the pursuit, Trooper Hughes observed that the two passengers in the car were constantly moving. (*Id.*). The front seat passenger turned and looked at Hughes several times, and both passengers continuously ducked below the seat level and then reappeared. (*Id.*). Once the car stopped, Hughes continued to see a lot of movement in

the car, which made him hesitant to approach it. (J.A. 12).

Trooper Hughes, who was alone in his cruiser, got out and saw that the driver of the Nissan had already exited the car. (J.A. 12, 32). The trooper directed the driver, Mr. McNichol, to step back toward him, and Hughes met the driver between their vehicles. (J.A. 12). Hughes advised McNichol that he had been stopped for speeding and asked to see his driver's license and registration card. (J.A. 12, 24). McNichol produced a valid Connecticut license and told the officer that he was on his way from Connecticut to South Carolina. (*Id.*). When McNichol said that the rental papers were in the car, Hughes instructed him to retrieve them. (J.A. 14). Throughout this encounter, McNichol was "unusually nervous." (J.A. 14-15).

Trooper Hughes also observed that the front seat passenger, respondent Jerry Lee Wilson, was sweating and extremely nervous. (J.A. 33). Because Hughes was concerned for his safety, he asked Wilson to get out of the car and step toward him. (J.A. 32, 35-36). After initially refusing to comply with this request, Wilson opened the door and took one step out, whereupon crack cocaine dropped to the ground. (J.A. 35-36).

Wilson was indicted on charges of possession of cocaine with the intent to distribute and related offenses. (J.A. 1). At a suppression hearing held in the Circuit Court for Baltimore County on November 23, 1994, the single issue was whether Trooper Hughes had violated Wilson's Fourth Amendment right to be free from unreasonable seizures when he ordered Wilson to step out of the car. (J.A. 17). Wilson argued that the cocaine should be suppressed because the trooper was not entitled to issue the order. (J.A. 47-49). The prosecutor argued

that the officer had the authority to order Wilson out of the car pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), and, alternatively, that the officer had reasonable suspicion to do so. (J.A. 41-42).

On January 10, 1995, the court granted Wilson's motion to suppress, ruling that Trooper Hughes did not have reasonable suspicion to order Wilson out of the car and that *Pennsylvania v. Mimms* did not authorize the trooper to do so automatically. (App. to Pet. for Cert. 34a-35a). The State appealed to the Court of Special Appeals of Maryland, (J.A. 1), which affirmed both aspects of the suppression court's ruling, (App. to Pet. for Cert. 6a-7a, 21a).[1]

SUMMARY OF ARGUMENT

In *Pennsylvania v. Mimms*, this Court recognized the authority of police officers making traffic stops automatically to order drivers out of their vehicles for reasons of officer safety. *Mimms* and subsequent cases suggest that this "automatic exit" rule applies to passengers as well.

That the *Mimms* rule extends to passengers is evident by application of this Court's Fourth Amendment general reasonableness balancing test. A passenger in a car enjoys only minimal privacy and liberty interests because travel on the roadways is highly regulated. When a car is

[1] In its petition for writ of certiorari to the Court of Appeals of Maryland, (J.A. 1), and in its petition to this Court, (Pet. for Cert. 4 n.1), the State pressed only the issue whether the officer had the automatic right to order Wilson out of the vehicle.

stopped because the driver has committed a traffic infraction, the ensuing delay affects the driver and passenger equally. Thus, when an officer orders a passenger to alight, the passenger, like the driver, suffers only a minor incremental intrusion upon his already diminished privacy and liberty interests.

Weighed against this minor intrusion is the government's compelling interest in police officer safety. So-called "routine" traffic stops are potentially dangerous for police officers. Consequently, an officer who stops a car for a traffic violation must be permitted to take reasonable steps to minimize the danger and ensure the safe completion of the stop. Requiring the officer to possess any suspicion of danger before he can act to protect himself would be ineffectual. By the time a sign of danger manifests itself, it may be too late for the officer to react. Waiting could result in the officer's being assaulted or killed. A rule requiring no level of individualized suspicion is the only efficacious way to secure the government's interest in officer safety.

When a passenger's minimal privacy and liberty interests are weighed against the compelling interest in officer safety, only one conclusion can be reached: The *de minimis* intrusion occasioned by the automatic exit order is reasonable under the Fourth Amendment. Because, in this case, the officer was authorized to order respondent Wilson to step out of the car, the cocaine that fell to the ground when he complied with the order was properly seized.

ARGUMENT

WHEN A POLICE OFFICER MAKES A LAWFUL TRAFFIC STOP, THE OFFICER'S AUTOMATIC RIGHT TO ORDER THE DRIVER TO EXIT THE VEHICLE PURSUANT TO *PENNSYLVANIA V. MIMMS* EXTENDS TO PASSENGERS IN THE VEHICLE.

A. *Pennsylvania v. Mimms* and its progeny suggest that a police officer may automatically order all occupants out of a vehicle that is lawfully stopped for a traffic violation.

Thousands of times each day, motor vehicles are stopped for traffic violations. Although labeled "routine," these encounters present real and significant risks to the police. For the most part, the identities, backgrounds, and motivations of motorists so stopped are unknown. Many drivers and their traveling companions, particularly those involved in criminality, carry firearms and other weapons in their cars and are willing to resort to violence rather than risk being identified and arrested. Drunk or drugged persons, whose impaired judgment often leads to volatile behavior, present yet another potential danger. So too, the increased use of motor vehicles for trafficking in illegal drugs enhances the likelihood that an unsuspecting officer will stumble upon a dangerous confrontation when initiating what appears to be a simple traffic stop.

This Court has long recognized the danger inherent in traffic stops. Almost two decades ago, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the Court

fashioned a rule permitting police in the course of such encounters to order the driver out of the vehicle without any particularized suspicion that the driver poses a threat to the officer's safety.

This Court has strongly signaled that police also may order passengers out of the vehicle. In *Mimms* itself, the Court balanced the *de minimis* intrusion into the driver's privacy and liberty interests against the State's "legitimate and weighty" interest in protecting officer safety, and concluded that, on balance, it is reasonable for the officer to order the driver to alight without any level of particularized suspicion. *Id.* at 110-11. The Court's holding and the rationale for it prompted three Justices to comment: "Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger." *Id.* at 122 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).

In two subsequent cases, the Court has assumed that the *Mimms* "automatic exit" rule applies to passengers. Two Justices unequivocally so stated just one year after the *Mimms* decision:

> Last Term, this Court determined in *Pennsylvania v. Mimms* that *passengers* in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made.

Rakas v. Illinois, 439 U.S. 128, 155 n.4 (1978) (Powell, J., joined by Burger, C.J., concurring) (emphasis added) (citation omitted). And, five years later, the Court noted: "In *Pennsylvania v. Mimms*, we held that police may order *persons* out of an automobile during a stop for a traffic violation . . . ." *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983) (emphasis added) (citation omitted). In light of

Mimms, *Rakas*, and *Long*, it may be said that this Court has tacitly approved orders directed at *anyone* to step out of a stopped vehicle.[2]

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[2] Many courts read *Mimms* as authorizing police as a matter of routine to order all occupants to exit a vehicle or, as the case may be, to remain in the vehicle. *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1327 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1841 (1996); *United States v. Hill*, 60 F.3d 672, 682 (10th Cir.), *cert. denied*, 116 S. Ct. 432 (1995); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.), *cert. denied*, 502 U.S. 981 (1991); *United States v. Sanders*, 631 F.2d 1309, 1312 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981); *United States v. McCoy*, 824 F. Supp. 467, 474 (D. Del. 1993); *State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (1991); *People v. Melgosa*, 753 P.2d 221, 225 (Colo. 1988); *State v. Dukes*, 209 Conn. 98, 122, 547 A.2d 10, 22 (1988); *Thomas v. United States*, 553 A.2d 1206, 1207 n.7 (D.C. 1989); *Doctor v. State*, 573 So. 2d 157, 159 (Fla. App. 1991), *rev'd in part on other grounds*, 596 So. 2d 442 (Fla. 1992); *People v. Salvator*, 236 Ill. App. 3d 824, 840, 602 N.E.2d 953, 963 (1992), *appeal denied*, 148 Ill. 2d 651, 610 N.E.2d 1273 (1993); *Warr v. State*, 580 N.E.2d 265, 267 (Ind. App. 1991); *State v. Landry*, 588 So. 2d 345, 347 (La. 1991); *Commonwealth v. Pappalardo*, 10 Mass. App. 897, 897, 409 N.E.2d 815, 816 (1980); *People v. Martinez*, 187 Mich. App. 160, 167 n.5, 466 N.W.2d 380, 384 n.5 (1991), *vacated on other grounds*, 439 Mich. 986, 483 N.W.2d 868 (1992); *State v. Ferrise*, 269 N.W.2d 888, 890-91 (Minn. 1978); *State v. Reynolds*, 753 S.W.2d 1, 2 (Mo. App. 1988); *People v. Robinson*, 74 N.Y.2d 773, 775, 545 N.Y.S.2d 90, 91, 543 N.E.2d 733, 733-34, *cert. denied*, 493 U.S. 966 (1989); *State v. Collins*, 38 N.C. App. 617, 619, 248 S.E.2d 405, 407 (1978); *State v. Gilberts*, 497 N.W.2d 93, 96 (N.D. 1993); *State v. Williams*, 94 Ohio App. 3d 538, 544, 641 N.E.2d 239, 243, *dismissed*, 70 Ohio St. 3d 1446, 639 N.E.2d 114 (1994); *Commonwealth v. Brown*, 439 Pa. Super. 516, 528, 654 A.2d 1096, 1102, *appeal denied*, 664 A.2d 972 (Pa. 1995); *State v. Soares*, 648 A.2d 804, 806 (R.I. 1994); *Graham v. State*, 893 S.W.2d 4, 7 (Tex. App. 1994); *Bethea v. Commonwealth*, 14 Va. App. 474, 476-78, 419 S.E.2d 249, 250-52 (1992) (en banc), *aff'd on other grounds*, 245 Va. 416, 429 S.E.2d 211 (1993); *State v. Richardson*, 156 Wis. 2d 128, 143, 456 N.W.2d 830, 836 (1990). Only a few courts, like the Court of Special Appeals did in this case, read *Mimms* differently. *People v. Maxwell*, 206 Cal. App. 3d 1004, 1008-09, 254 Cal. Rptr. 124, 126-27 (1988); *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990); *State v. Smith*, 134 N.J. 599, 616-17, 637 A.2d 158, 166 (1994); *Johnson v. State*, 601 S.W.2d 326, 328-29 (Tenn. Crim. App. 1980).

B. It is reasonable under the Fourth Amendment for the police to order passengers out of a lawfully stopped vehicle without any level of particularized suspicion.

Analysis of the issue under the general reasonableness test confirms what is implicit in *Mimms*: Police are permitted as a matter of routine to order passengers out of a vehicle that has been stopped for a traffic violation.

The "fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).[3] Whether a particular

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[3] A police officer's command that a passenger alight from a vehicle, if complied with or forcibly carried out, is a seizure under the Fourth Amendment. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991).

law enforcement practice is reasonable "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *accord Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2390 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). This approach recognizes that the Fourth Amendment does not prohibit every intrusion, but only "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

The reasonableness balancing analysis has three components. The first factor to be considered is the nature of the interest upon which the search or seizure intrudes. *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. at 2391. The second factor relates to the character of the intrusion. *Id.* at 2393. The third factor involves "the nature and immediacy of the governmental concern at issue," and the efficacy of the means for meeting it. *Id.* at 2394; *accord Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448-49 (1990); *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

On balance, the government's interest in officer safety during traffic stops surpasses the countervailing interests of the passenger. And, because the order to leave a lawfully stopped vehicle is but a negligible intrusion and is the most efficacious way of ensuring officer safety, the balance tilts in favor of authorizing the police to issue the order without any level of particularized suspicion.

1. A passenger in a vehicle traveling on a public highway enjoys only minimal privacy and liberty interests.

When Wilson was made to alight from the car, two of his Fourth Amendment interests were implicated: the right to privacy and the right to personal liberty. But, because the exit order came during the course of a traffic stop, these interests were greatly diminished.

"Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). Although an individual does not lose all reasonable expectation of privacy when he steps inside a car, *Delaware v. Prouse*, 440 U.S. at 662, he "must expect that the State, in enforcing its regulations, will intrude to some extent" upon that privacy, *New York v. Class*, 475 U.S. 106, 113 (1986). Because vehicles are highly regulated, "the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *accord Pennsylvania v. Labron*, 64 U.S.L.W. 3865, 3865 (U.S. July 1, 1996) (per curiam); *California v. Carney*, 471 U.S. 386, 392 (1985).

Thus, all persons who travel on the public roadways, drivers and passengers alike, understand that they may be stopped by governmental agents. Sometimes a stop occurs at a sobriety checkpoint, a border checkpoint, or a toll booth. Other times the stop may be for a traffic violation such as running a red light or, as in this case, speeding. Much like persons who choose employment in closely regulated industries, *Skinner v. Railway Labor Executives'*

Ass'n, 489 U.S. at 627, and school children who elect to participate in school-sponsored athletic programs, *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. at 2393, vehicular travelers voluntarily subject themselves to the highly regulated environment of public thoroughfares.

The regulated nature of highway travel affects not only travelers' privacy, but their liberty as well. To be sure, persons traveling on the highways enjoy an interest in their freedom of movement just as they do in their homes or workplaces, but that interest is more often compromised on the roadways and is significantly reduced as a result.

Both the driver and the passenger have the right, as a general matter, to come and go as they please. But, both have subjected themselves to the highly regulated, and public, nature of highway travel; and, when the car is stopped, both have their freedom of movement legitimately curtailed. Therefore, a passenger in a vehicle stopped for a traffic violation has no greater privacy and liberty interests than does the driver, even though it is the driver whose wrongdoing precipitated the stop. If anything, the passenger's liberty interest when riding in a car is even less than that of the driver because the passenger has relinquished to the driver a large measure of control over the passenger's own right of locomotion. Indeed, when and how a passenger reaches his destination is entirely in the hands of the driver.

In sum, passengers in cars stopped for traffic violations have a diminished interest in their privacy and liberty. While automobile travel has great benefits, travelers knowingly accept the regulatory burdens that go with it.

2. The order to alight from a lawfully stopped vehicle is a minimal intrusion upon the passenger's privacy and liberty interests.

Not all Fourth Amendment seizures of the person are equally invasive. At one end of the continuum is a custodial arrest; a *Terry*[4] stop is a lesser intrusion; and an order to move a short distance in conjunction with a lawful traffic stop is at the opposite end. As this Court made clear in *Pennsylvania v. Mimms*, the last of these seizures is "*de minimis*." 434 U.S. at 111.

The Court explained in *Mimms* that once a vehicle has been lawfully stopped for a traffic violation, the order to a driver to step out is an incremental intrusion.

> The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "'petty indignity.'" *Terry v. Ohio*, *supra*, 392 U.S. [1,] 17 [(1968)]. What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

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[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

434 U.S. at 111.[5]

In its practical effect, ordering the passenger to step out of the vehicle is no different. This is so for a number of reasons. First, the order comes on the heels of the passenger's already having been stopped: The laws of physics demanded that when the car in which Wilson was riding was brought to a halt, so too was he. Wilson, of course, was not the recipient of the traffic citation. Nevertheless, as a practical matter, he was forced to remain by the side of an interstate highway until the traffic stop drew to a close. *Cf. Florida v. Bostick*, 501 U.S. 429, 436 (1991) (recognizing that, once aboard a bus that is scheduled to depart, a passenger does "not feel free to leave").

Second, in both spatial and temporal terms, stepping out of a car during a traffic stop is an inconsequential intrusion. Like the driver, Wilson was required to move

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[5] One commentator reads *Mimms* as holding "that some movement of a nonarrest detainee so minimally intrudes upon privacy interests as to render it of no constitutional significance." George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 897. Another commentator reads *Mimms*, as well as *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and *Michigan v. Summers*, 452 U.S. 692 (1981), as suggesting that, once an initial detention occurs, police have "limited authority" to move a detainee a short distance for purposes other than evidence gathering. Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 810-11 (1982). This additional movement, in that commentator's view, creates "no fourth amendment problem beyond that inherent in the original stop." *Id.* at 810.

but a short distance and, in doing so, exposed little more of himself to the view of the officer than he did when seated inside the car. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (occupants of car are "in plain view" when traveling on highways). This modest intrusion pales in comparison to being handcuffed or being delivered to the stationhouse. Moreover, but for the development of probable cause to arrest Wilson, the minor intrusion precipitated by the officer's order to step out would have lasted only the few minutes occasioned by the traffic stop itself. *See Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) (detention of motorist pursuant to traffic stop is presumptively temporary and brief because the vast majority of roadside stops last only a few minutes). The brevity of the intrusion also testifies to its *de minimis* character. *See United States v. Place*, 462 U.S. 696, 709 (1983) (brevity of invasion of Fourth Amendment interest is an important factor in reasonableness inquiry).

Third, the order to alight from the vehicle subjects the passenger to little or no embarrassment, indignity, or concern. Most people at one time or another have been in cars stopped for a traffic violation. Indeed, such stops occur with enough frequency that they come as no surprise to the individuals involved and are greeted with little curiosity by passersby. Given the routine nature of traffic stops and the minimal concern attendant to them, passengers who are told to join the driver in stepping out of the car as part of such a stop suffer little real impact on the "sanctity of the person." *Pennsylvania v. Mimms*, 434 U.S. at 111; *see also Berkemer v. McCarty*, 468 U.S. at 438 (exposure to public view during traffic stops

diminishes motorists' fear of abusive police conduct).[6]

Fourth, the seizure undertaken here is "for prophylactic and distinctly *non*punitive purposes." *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. at 2393 n.2. As is true with the driver, the passenger is not made to step out of the vehicle to facilitate evidence gathering or investigation into criminal activity. Rather, the sole justification for the order is tied to a different concern altogether—the safe completion of a lawful traffic stop.

3. Officer safety is a compelling governmental interest and the automatic right to order passengers out of lawfully stopped vehicles is an efficacious means of satisfying that interest.

Even a minimally intrusive seizure would be unreasonable if not done to further an important governmental interest. But, the government's interest in officer safety is compelling, as this Court has recognized time and time again.[7] Indeed, in *Pennsylvania v. Mimms*

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[6] Doubtless, persons who have evidence of criminality to hide may be concerned if asked to step out of a car. The Fourth Amendment's reasonableness standard, however, does not presuppose the guilty person but, rather, the law abiding citizen. *Florida v. Bostick*, 501 U.S. 429, 438 (1991); *accord Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (fear and surprise engendered by sobriety checkpoint is measured from perspective of sober motorist).

[7] *E.g.*, *Maryland v. Buie*, 494 U.S. 325, 333-34 (1990); *New York v. Class*, 475 U.S. 106, 116 (1986); *United States v. Hensley*, 469 U.S. 221, 235 (1985); *Michigan v. Long*, 463 U.S. 1032, 1046-48 (1983); *Washington v. Chrisman*, 455 U.S. 1, 7 (1982); *Michigan v. Summers*, 452 U.S. at 702; *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977) (per curiam); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973); *Adams v. Williams*, 407 U.S. 143, 147-48 (1972); *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *Terry v. Ohio*, 392 U.S. at 23-24; *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

the Court declared it "unreasonable to require that police officers take unnecessary risks in the performance of their duties." 434 U.S. at 110 (quoting *Terry v. Ohio*, 392 U.S. at 23).

The risk of immediate harm to police who conduct traffic stops is neither illusory nor insignificant. This Court has emphasized repeatedly that such encounters are particularly dangerous. *See Michigan v. Long*, 463 U.S. at 1049 ("[R]oadside encounters between police and suspects are especially hazardous, and . . . danger may arise from the possible presence of weapons in the area surrounding a suspect."); *New York v. Class*, 475 U.S. at 116-17 (police may effect a seizure of a person stopped for traffic violation, for reasons of officer safety, because cars may contain handguns); *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (even "routine" traffic stops can result in police officers' being wounded or killed, because vehicle occupants may be "armed and engaged in or embarked on serious criminal conduct").

The danger lurking in traffic stops has only intensified in recent years.[8] It is far more likely today that a car will

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[8] Over twenty years ago, this Court cited a study showing "that approximately 30% of the shootings of police

contain a firearm. The design of many of today's vehicles also presents new challenges to the police. The higher ground clearance of four-wheel-drive vehicles, the interior configuration of minivans, and the popularity of tinted windows each make it difficult, if not impossible, for the officer to assess the potential danger involved in the stop.

The Court has explained how removing the driver can reduce the threat of danger:

> Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.

Pennsylvania v. Mimms, 434 U.S. at 110; *see New York v. Class*, 475 U.S. at 116 (recognizing danger to officer in permitting detainee to remain in car with possible access to dangerous weapon). The same holds true for passengers.

If anything, the danger inherent in roadside encounters increases when passengers are present. Like drivers, passengers have access to weapons that may be inside the passenger area of a car. Thus, ordering the driver alone to

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officers occur when an officer stops a person in an automobile." *United States v. Robinson*, 414 U.S. at 234 n.5. A more recent study confirms that officers are frequently assaulted or killed during traffic encounters. In 1994 alone, 5,762 law enforcement officers were assaulted during traffic pursuits and stops. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1994, at 71 (1996). From 1985 through 1994, 97 officers were slain in such encounters. *Id.* at 31.

exit does not erase the danger. Moreover, a passenger might well act in concert with the driver or other passengers to ambush the officer, or act alone to do so while the officer is dealing with the driver. The dangers that attend any traffic stop multiply with each additional occupant.[9]

Permitting officers as a matter of routine to control the movements of all occupants in a vehicle lawfully stopped for a traffic violation is the only efficacious means of addressing the concern for officer safety. It is simply impracticable to require the officer to have particularized suspicion of danger before acting to protect himself. By the time the officer detects the threat, the passenger may already have secured a tactical advantage. Indeed, the officer could be wounded or killed before any sign of danger presents itself. *Cf. Vernonia School Dist. 47J v. Acton*, 115 S. Ct. at 2396 (suspicion-based drug testing is impracticable in part because drug-impaired individuals often do not display outward signs of impairment).

For another reason, requiring police to await some indicia of dangerousness on the part of the passenger is

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[9] This is particularly so when the officer makes a traffic stop on suspicion of drunk driving, a not uncommon occurrence. Experience suggests that if the driver is intoxicated, the passenger likely is as well, or the passenger would be the "designated driver." Given the lack of judgment and restraint that often accompanies intoxication, the risk to the officer in dealing with drunk or drugged occupants of a vehicle is even greater than that presented by those who are sober. *See Montana v. Egelhoff*, 64 U.S.L.W. 4500, 4503 (U.S. June 13, 1996) (observing that half of all homicides are committed by persons under the influence of alcohol).

ineffective in protecting the goal of officer safety. The officer's attention must be focused on the driver and on completing the purpose of the traffic stop. The officer ought not (and practically speaking cannot) be made, at the same time, to keep watch over the actions of the passenger. A suspicion-based right of police to order passengers out of vehicles that are lawfully stopped for traffic violations would actually *impair* the government's interest in the safe and successful conduct of those stops. *Cf. id.* at 2396 n.3 (rejecting suspicion-based drug testing of student athletes because such a procedure would "impair other policies important to the institution").

Alternative suspicionless practices would not strike the proper balance between the competing governmental and individual interests. For example, a rule permitting police only to inquire whether a passenger has a weapon would no doubt be reasonable under the Fourth Amendment. But, given a criminal defendant's incentive to lie in responding to this question, such a rule would hardly be efficacious. Likewise, a rule permitting police to frisk every passenger would be an efficacious method of furthering the goal of officer safety, but such a rule may not be reasonable.

This Court in the past has adopted bright-line rules requiring no level of particularized justification to meet the exigencies of the police-citizen encounter at hand and to further the goal of officer safety. *See, e.g., New York v. Belton*, 453 U.S. 454, 458 (1981); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973).[10] As in those

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[10] In other contexts, as well, this Court has struck the balance between competing governmental and individual interests in favor of allowing the intrusion without any level of individualized suspicion: the maintenance of automobile checkpoints for detection of illegal immigrants and contraband, *United States v. Martinez-Fuerte*, 428 U.S. at 561-62, and drunk drivers, *Michigan Dep't of State Police v. Sitz*, 496 U.S. at 455; and the drug testing of school children who participate in school-sponsored athletic programs, *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2396-97 (1995), of railroad employees involved in train accidents, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633-34 (1989), and of federal customs officers who bear arms or are involved in drug interdiction, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989).

cases, officers confronting the inherent dangers of traffic stops should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis before taking a limited step to ensure their safety. Instead,

> [a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

New York v. Belton, 453 U.S. at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)) (alteration in original); *accord New York v. Quarles*, 467 U.S. 649, 659 (1984) (officers must be left free "to follow their legitimate instincts when confronting situations presenting a danger to the public safety"). During the time taken to analyze the legal ramifications of their conduct, officers could be overpowered, injured, or killed.

Mimms itself is the paradigm for application of an automatic rule to effectuate the goal of officer safety.

Mimms is not the sole example, however. This Court has recognized that the danger inherent in the execution of a warrant to search a home permits police to take reasonable protective steps without any specific justification. *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981) (execution of search warrant may give rise to sudden violence, and risk of harm to police and occupants is minimized if police "routinely exercise unquestioned command of the situation"). A separate warrant authorizing the detention of persons at the scene is not required because the search warrant "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnote omitted). Nor are officers "required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.* at 705 n.19.

The reasoning of *Summers* applies with equal force to traffic stops. Not only are the exigencies of officer safety and law enforcement virtually identical in both situations, so too is the minimal nature of the intrusion upon the individual. Thus, much like a search warrant, the authority to stop a vehicle for a traffic violation carries with it the authority to execute the stop safely and without interference. The directive to all occupants that they alight from the vehicle is a necessary "incident" to the traffic stop.[11]

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[11] In other situations where an initial intrusion is already justified, the Court has authorized an additional intrusion to permit officers to carry out their duties safely. *See, e.g., Chimel v. California*, 395 U.S. at 762-63 (incident to arrest, police may search area within arrestee's immediate control); *New York v. Belton*, 453 U.S. 454, 460 (1981) (incident to arrest, police may search passenger compartment of car); *New York v. Class*, 475 U.S. at 119 (incident to traffic stop, police may search car to obtain vehicle identification number); *South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976) (incident to impoundment, police may inventory contents of automobile).

4. On balance, the minimal intrusion occasioned by the order to alight is outweighed by the compelling governmental interest in officer safety.

Taking into account all the factors considered above—the minimal privacy and liberty interests at stake, the *de minimis* intrusion occasioned by the order to alight, and the importance of the government's interest in safeguarding the lives of police officers—the balance weighs heavily on the government's side. These same considerations were at issue in *Mimms* and produced the rule that police may automatically order a driver to alight from a lawfully stopped vehicle. The rule can be no different for passengers. The risk to officer safety is the same, if not greater, when passengers are present, and the intrusion is just as minimal with respect to the passenger as it is with the driver.

To be sure, the passenger presumably had nothing to do with the wrongdoing that led to the initial stop of the car. It is enough to say in answer to this point, however, that the order to Mimms himself to alight had nothing to do with his initial wrongdoing, but, instead, was tied to the potential danger presented by a person seated in a car. *Pennsylvania v. Mimms*, 434 U.S. at 110; *Michigan v.*

Long, 463 U.S. at 1047-48; *New York v. Class*, 475 U.S. at 116.

Moreover, the presumed innocence of the passenger does not mean that he is insulated from police intrusion. In a number of situations, police have the authority to control the movements of innocent persons. Whenever police evacuate a building in response to a bomb threat, secure a crime or accident scene, or reroute traffic around an Independence Day parade, they necessarily direct the movement of persons who have done no wrong.

In other contexts, this Court has implicitly authorized even more invasive intrusions into an individual's privacy or possessory interest in furtherance of law enforcement goals unrelated to the individual. Police may search jointly owned property and possessions even though the justification for the search is predicated upon the conduct of only one of the joint possessors. Police may enter a home to search for and arrest a resident, *Payton v. New York*, 445 U.S. 573, 603 (1980), to accompany someone already arrested, *Washington v. Chrisman*, 455 U.S. 1, 6-7 (1982), or to search for victims at a crime scene, *Mincey v. Arizona*, 437 U.S. 385, 392 (1978), notwithstanding that the entry into the home and search therein intrudes upon the privacy of fellow residents.

Similarly, police may search the entire interior of a car incident to the arrest of one of its occupants, *New York v. Belton*, 453 U.S. at 460, even though other occupants of the car would almost certainly be made to exit the car to facilitate the search, and would have any of their own belongings in the passenger compartment examined in the course of that search. And, police may conduct inventory searches of an impounded vehicle, *South Dakota v. Opperman*, 428 U.S. at 375-76, despite the fact that items

in the car that are searched may belong to persons who have done nothing wrong. In short, merely because an intrusion affects "innocent" third parties does not make it unreasonable.

The contours of Maryland's proposed rule are clear and precisely tied to the justification for it: During the brief time it takes to complete a traffic stop, the officer should be permitted to take limited measures to control the movement of all occupants for the sole purpose of ensuring the officer's safety. Ordering all occupants out of the vehicle is one such measure.[12]

As was the case in *Mimms*, Maryland "does not, and need not, go so far as to suggest that an officer may frisk the occupants of any car stopped for a traffic violation." 434 U.S. at 110 n.5. Neither does Maryland argue that "whenever an officer has an occasion to speak with the [occupants] of a vehicle, he may also order the [occupants] out of the car," *id.* at 111 n.6, much less that the rule authorizes the police to remove the occupants from the scene, *cf. Dunaway v. New York*, 442 U.S. at 216 (probable cause required to take suspect to police station);

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[12] Depending on the circumstances, of course, the officer may deem it more appropriate to have the occupants remain in the vehicle. *See New York v. Class*, 475 U.S. at 115 (keeping driver of vehicle in car during routine traffic stop is typical police practice). The reasoning underlying Maryland's proposed rule would necessarily permit officers to take this course of action as well. The propriety of a police order to passengers to remain in the car is pending in another case before this Court. *Dennis v. State*, 342 Md. 196, 674 A.2d 928 (1996), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 18, 1996) (No. 96-112).

Davis v. Mississippi, 394 U.S. 721, 727-28 (1969) (same).

Rather, the rule simply—and only—authorizes the police to neutralize the potential danger inherent in all traffic stops by controlling the movements of passengers until the brief encounter safely draws to a close. The limited intrusion occasioned by an order to alight in no way can be characterized as "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. at 554. Like the rule of *Mimms*, the rule proposed here is consonant with the Fourth Amendment.

C. Because Trooper Hughes was entitled to order Wilson to step out of the car, the trooper was also entitled to seize the cocaine that was exposed as a result.

When Trooper Hughes ordered Wilson to step out of the car in which he had been riding as the front seat passenger, a quantity of what Hughes reasonably suspected was (and ultimately proved to be) cocaine fell to the ground. Because Hughes was authorized to issue the command to Wilson, the resultant exposure of the cocaine was in Hughes's "plain view," and he was entitled to seize it. *See Minnesota v. Dickerson*, 508 U.S. 366, 374-75 (1993); *Horton v. California*, 496 U.S. 128, 136-37 (1990).

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the judgment of the Court of Special Appeals of Maryland be reversed.

Respectfully submitted,

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August 1, 1996